

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>BILL WILSON, JR.</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,043,725
<b>J NEAL &amp; SONS CONSTRUCTION, INC.</b>	)	
Respondent	)	
AND	)	
	)	
<b>FARM BUREAU MUTUAL INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appealed the May 5, 2009, Preliminary Hearing Order entered by Administrative Law Judge Rebecca Sanders.

**ISSUES**

Claimant alleges he injured his left wrist and low back at work on December 29, 2008, while picking up large pieces of concrete. In the May 5, 2009, Order, Judge Sanders found there was no reason to modify the February 18, 2009, Preliminary Hearing Order that she had earlier entered. In that order, the Judge denied claimant's request for benefits on the basis that claimant had failed to prove (1) he injured himself at work and (2) he provided respondent with timely notice of his alleged accident. The Judge held in pertinent part:

Claimant's preliminary hearing requests are considered and denied. Claimant has failed to sustain his burden of proof of personal injury, by accident, arising out of and in the course of his employment with Respondent. Claimant has failed to sustain his burden of proof that appropriate notice of accident was provided within ten days and has failed to establish just cause for enlargement of the notice period to seventy-five days.

Claimant alleges he injured his back and wrist on December 29, 2008 when he lifted blocks of cement. However, credible evidence shows Claimant was lifting cement blocks on December 2, 2008 and there is no evidence Claimant reported an injury until December 29, 2008 or December 31, 2008.

This Court is not persuaded that Claimant suffered any work related injury on December 29, 2008. If Claimant suffered a work related accident, it was on December 2, 2008. There is no evidence that notice of an accidental injury suffered by Claimant was given to the employer within ten days.

Further, the Court is not persuaded that Claimant's injuries arose out of and in the course of employment. The evidence does not show that any conditions or circumstances on the job caused Claimant's current symptoms.<sup>1</sup>

Claimant contends the Judge erred in the May 5, 2009, Order by adopting the above-quoted findings and denying his request for benefits. Claimant maintains there is no evidence claimant was injured on December 2, 2008, or that he worked that day where he alleges his injuries occurred. Moreover, claimant contends the testimony of respondent's witness, Ms. Ardis Neal, leaves December 29, 2008, as the only possible date of claimant's accident. Next, claimant argues the medical opinion from Dr. John B. Moore, IV, corresponds with a December 29, 2008, accident date. Accordingly, claimant requests the Board to set aside the May 5, 2009, Order and remand the claim to the Judge for a preliminary award of temporary total disability benefits and medical treatment.

Respondent argues the Judge may have abused her discretion in allowing a second preliminary hearing in this claim. In addition, respondent asserts that the May 5, 2009, Preliminary Hearing Order did not determine any issue other than whether claimant introduced *new evidence* and, therefore, the Board lacks jurisdiction to review that Order. In the alternative, respondent argues the evidence establishes that claimant did not lift any concrete on December 29, 2008, and that respondent did not receive any notice of claimant's alleged injuries until Ms. Neal received a letter from claimant's counsel dated January 6, 2009. In summary, respondent requests the Board to either dismiss this claim or affirm the Order.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the May 5, 2009, Order?
2. If so, did claimant prove he injured himself at work and that he gave respondent timely notice of his accident?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date, the undersigned Board Member finds and concludes:

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<sup>1</sup> ALJ Order (Feb. 18, 2009) at 1, 2.

The first issue to address is whether the Board has jurisdiction to review the May 5, 2009, Preliminary Hearing Order. Although the Judge initially denied claimant's request for preliminary hearing benefits in an order dated February 18, 2009, which followed a preliminary hearing on that same date, the Judge permitted claimant to present additional evidence. Consequently, a second preliminary hearing was held on May 5, 2009, when additional evidence was presented. The Judge then ruled that there was no reason to disturb the earlier Preliminary Hearing Order.

The February 18, 2009, Preliminary Hearing Order was not appealed to the Board. By implication, the May 5, 2009, Preliminary Hearing Order entered by the Judge adopted the findings that were made in the earlier order; namely, that claimant failed to prove he sustained an accidental injury that arose out of and in the course of his employment with respondent and that he failed to prove he provided respondent with timely notice of his alleged accident.

The Board has jurisdiction to review the May 5, 2009, Preliminary Hearing Order. In reviewing preliminary hearing orders, the Board has jurisdiction to review the findings of whether an employee has sustained personal injury by accident arising out of and in the course of his or her employment and whether the employer was provided with timely notice of an accident.<sup>2</sup> In short, the Board has jurisdiction over the issues raised in this appeal and to conduct this review.

The next issue is whether claimant has sustained his burden of proving that on December 29, 2008, he sustained personal injury by accident arising out of and in the course of his employment with respondent. The outcome of this claim depends upon which witness is to be believed. Claimant, who is 52 years old and has worked intermittently for respondent over a number of years, testified that in December 2008 he was working for respondent as a laborer and cement finisher when he hurt his back lifting heavy chunks of concrete. Claimant contends that on December 29, 2008, he was working on the street at 29th and Arnold in Topeka, Kansas, when he slipped and wrenched his back and injured his wrist. Claimant testified at his first preliminary hearing, in part:

[W]e had to pick up and throw -- throw the [broken concrete] in the bucket [of the Bobcat], and so this side right here was just the clay part, and so I slipped when I turned around and wrenched my back and I bent my wrist back, and so I sprained my wrist, too, I guess. That's what the doctor told me.<sup>3</sup>

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<sup>2</sup> See K.S.A. 44-534a.

<sup>3</sup> P.H. Trans. (Feb. 18, 2009) at 13.

Claimant also testified that the day before his accident, December 28, 2008, was the day they actually had removed most of the concrete from the area they were preparing for new cement. And, therefore, on the date of accident the crew was actually making final preparations for the pouring of the new cement by removing enough material so that the area would be exactly nine inches deep.<sup>4</sup>

Claimant testified that the crew was at the job site for approximately three hours on December 29, 2008, and that he picked up chunks of concrete for at least an hour.<sup>5</sup> He also testified that he was working with Robert West at the time of his alleged accident and that Carlos Hernandez was also present at the site. But according to claimant, Mr. Hernandez spent his time sitting in the car with a girlfriend.

The record is somewhat unclear but it appears claimant contends that he reported his injury to Ms. Ardis Neal, respondent's president, on either December 29 or 31, 2008. In either event, claimant testified that Ms. Neal ignored his report of an injury.<sup>6</sup>

Claimant initially testified that he had not worked since December 29, 2008. He later changed that testimony and indicated that he also worked part of the day on both December 30 and 31, 2008.

Claimant contacted counsel, who wrote respondent. That letter, which is dated January 6, 2009, is captioned with the words "Demand Letter" at the top and a reference line that reads "Bill Wilson Jr. [claimant] v. J Neal & Son Construction, Inc." The letter states that counsel represents "the above named claimant" and then requests medical information and future medical reports, payroll records for the 26-week period before the date of accident, and a statement of the value of fringe benefits provided by respondent. Although the letter cites two statutes in the Workers Compensation Act, the letter does not state that claimant was injured at work, does not provide a date of accident, or otherwise indicate claimant was alleging he was injured while working for respondent.<sup>7</sup>

Claimant testified he presently has muscle spasms in his back for which he takes muscle relaxers. He also testified his left wrist swells.

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<sup>4</sup> *Id.* at 28.

<sup>5</sup> *Id.* at 29.

<sup>6</sup> *Id.* at 16.

<sup>7</sup> *Id.*, Cl. Ex. 1.

On January 16, 2009, claimant sought medical treatment at Saint Francis Hospital and Medical Center in Topeka. Records from that facility indicate claimant provided a history of being injured at work on December 29, 2008, when he slipped on clay and hurt his back and left wrist. The history also contains a statement that claimant reported his injury to his employer the day of his accident. The doctor who prepared the Emergency Report for the medical center, Dr. Donald T. Mead, stated in the report that he was asked to address “causation.”<sup>8</sup>

Dr. John B. Moore, IV, examined claimant on January 30, 2009. Claimant advised the doctor that he had worked for respondent for approximately 10 years as a cement finisher and laborer and that about a month before he had lost his balance while lifting concrete and hyperextended his left wrist. Following an MRI and x-rays of claimant’s left wrist the doctor concluded claimant had sustained repetitive microtraumas over a 10-year period and the most recent incident exacerbated the underlying degenerative condition in his wrist. The doctor noted, in part:

His most recent injury was the final “straw [that] broke the camel’s back.” The degenerative arthritis has been going on for ten years but he has been working for [respondent] for those ten years in a high-demand job that certainly has been a major contributing factor to the development of this type of arthritis. This is not the type of degenerative picture we get just from aging joints and is due to repeated microtraumas over a ten-year period of time that have been exacerbated by the last trauma he had to cause the swelling and pain that brought it to his attention.<sup>9</sup>

Dr. Moore recommended wrist surgery.

This is not the first time that claimant has allegedly injured his back while working. Claimant agreed he injured his back in October 1996 and received a nine percent impairment rating from a Dr. Shechter. He also agreed he injured his back working for respondent in October 1990 and received a seven and one-half percent impairment rating from Dr. Shechter. Finally, he agreed he injured his back in August of an unstated year and received a five percent impairment rating from a Dr. McKinney.

Carlos Hernandez, who supervised the job at 29th and Arnold, testified he broke up the concrete street with a jackhammer attached to a Bobcat at the work site where claimant allegedly was injured on December 29, 2008. Mr. Hernandez testified that on December 29, 2008, claimant operated a Bobcat and “scooped the rocks and stuff out of

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<sup>8</sup> *Id.*, Cl. Ex. 2.

<sup>9</sup> P.H. Trans. (May 5, 2009), Cl. Ex. 1.

the hole and loaded it on the truck with a machine.”<sup>10</sup> Mr. Hernandez testified claimant operated the Bobcat most of that day and that claimant was never asked to lift the 30-pound chunks of concrete as that was Mr. West’s job. Moreover, Mr. Hernandez stated he personally lifted some of the concrete because claimant operated the Bobcat the majority of the day.

According to Mr. Hernandez, claimant never mentioned a work-related accident on December 29, 2008.<sup>11</sup> Mr. Hernandez did, however, testify that all the bigger chunks of concrete and rock were removed on December 29, 2008, and that the next day they worked preparing the site for new cement. Consequently, the only concrete pieces removed on December 30, 2008, weighed only two or three pounds. Mr. Hernandez testified he did not work with claimant on December 31.

Moreover, Mr. Hernandez testified he worked with claimant at a different job site on December 2, 2008, and that is when claimant loaded *rocks* by hand into the bucket of a Bobcat.<sup>12</sup> Nevertheless, according to Mr. Hernandez claimant never reported an accident to him from December 2 through December 31, 2008.<sup>13</sup> He also denies spending the morning of December 29, 2008, in the car with a girlfriend.

Mark Neal, who is employed by respondent as a foreman, testified that in either late November or early December 2008 he worked with claimant on a job replacing two driveways and a stretch of sidewalk. According to Mr. Neal, on that job claimant loaded concrete and rocks into a bucket.<sup>14</sup> In addition, Mr. Neal testified that while on that job claimant never advised him of a work-related accident.

Finally, Ms. Ardis Neal testified claimant did not notify her on December 29, 2008, of an accident at work. Moreover, she testified that on December 31, 2008, claimant requested her to pay him early, rather than waiting for payday, and that he became belligerent when his request was denied. The police were called, claimant obtained his paycheck, and claimant was fired. Ms. Neal testified claimant did not tell her he had been injured at work.<sup>15</sup>

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<sup>10</sup> P.H. Trans. (Feb. 18, 2009) at 51.

<sup>11</sup> *Id.* at 53.

<sup>12</sup> *Id.* at 60.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 82.

<sup>15</sup> *Id.* at 104.

Robert West, who is the co-worker working with claimant on December 29, 2008, when claimant allegedly slipped and injured his back and left wrist, did not testify.

Searching for the truth among these witnesses is a difficult task. Claimant admits to committing “employment security fraud.”<sup>16</sup> Mr. Hernandez, who is Ms. Ardis Neal’s son, admits to being convicted for “a simple robbery case.”<sup>17</sup> And Mark Neal, who is Ms. Ardis Neal’s brother, acknowledges a history of multiple armed robberies and burglaries.<sup>18</sup> In addition, the undersigned is not persuaded that Ms. Neal is particularly credible.

Judge Sanders had the opportunity to observe all the witnesses testify. Accordingly, her personal observations are necessarily part of her assessment of the witnesses’ credibility. In addition, it was quite evident claimant was confused about what days he worked for respondent in late December 2008. Moreover, claimant testified that he lifted the concrete chunks for at least an hour on December 29, 2008. But at another point he testified that on the date of accident they were making final preparations for the pouring of the concrete by removing enough of the underlying material to make the site nine inches deep and that they had actually removed most of the concrete the day before.

Claimant’s testimony regarding his injury is inconsistent. And in light of the contrary testimony from respondent’s witnesses and the Judge’s implied finding that respondent’s witnesses were more credible than claimant, the undersigned affirms the Judge’s finding that claimant failed to prove he sustained an injury on December 29, 2008, that arose out of and in the course of his employment with respondent. That finding renders the issue of timely notice moot.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>19</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the undersigned affirms the May 5, 2009, Preliminary Hearing Order entered by Judge Sanders.

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<sup>16</sup> *Id.* at 46.

<sup>17</sup> *Id.* at 62, 63.

<sup>18</sup> *Id.* at 87.

<sup>19</sup> K.S.A. 44-534a.

**BILL WILSON, JR.**

**DOCKET NO. 1,043,725**

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 2009.

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KENTON D. WIRTH  
BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant  
Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge